In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-9

AMERICAN FIDELITY FIRE INSURANCE COMPANY,
PETITIONER,

v.

SUE KLAU ENTERPRISES, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

EDWARD M. BORGES
O'NEILL & BORGES
Chase Manhattan Bank Building
Tenth Floor
Hato Rey, Puerto Rico 00918
Attorneys for Respondent

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Opinions Below

The opinion of the Court of Appeals for the First Circuit entered on April 6, 1977 is reported at 551 F.2d 882 (1st Cir. 1977) and is reprinted as Appendix A to the Pe-

tition for a Writ of Certiorari. Petitioner's Motion for a Rehearing was denied by Order of the Court of Appeals entered on July 8, 1977. *See* Appendix A herein. The Judgment of the United States District Court for the District of Puerto Rico reviewed below was entered on January 29, 1976 based on the District Court's Opinion and Order dated January 27, 1976, No. 74-1334. Although the District Court's Opinion is not reported, it is reprinted as Appendix B to the Petition for a Writ of Certiorari.

Jurisdiction

Respondent does not question the jurisdiction as set forth in the petition.

Question Presented

Whether the Court of Appeals was correct in exercising its appellate jurisdiction to entertain an appeal from a judgment of the District Court vacating an arbitration award and dismissing an action brought to confirm said award without retaining jurisdiction over the controversy.

Statutes Involved

The pertinent provisions of Sections 1291 and 1292 of Title 28 of the United States Code and Rule 54(b) of the Federal Rules of Civil Procedure are set forth in the Petition as Appendix C.

Statement of the Case

The Respondent, Sue Klau Enterprises, Inc., hereinafter referred to as "Sue Klau", filed an action with the District Court for the District of Puerto Rico for the confirmation

of an arbitration award rendered pursuant to the provisions of an arbitration clause contained in a written contract which the Petitioner incorporated by reference in the bonds it issued in favor of Sue Klau. The Petitioner, American Fidelity Fire Insurance Company, hereinafter also referred to as "the Bonding Company", filed an answer to the Complaint denying, in essence, the validity of the arbitration award and counterclaimed for the recovery of certain monies allegedly disbursed by the Bonding Company pursuant to its contractor's bonds issued in favor of Sue Klau. Sue Klau denied the allegations of the counterclaim and asserted, *inter alia,* that the Bonding Company's counterclaim was fully adjudicated and is now merged in the arbitration award. Sue Klau filed a Motion for Summary Judgment supported by the affidavit of its Vice-President, a transcript of the deposition taken of the Arbitrator and the Bonding Company's answers to a Request for Admissions, requesting the confirmation of the arbitration award rendered in this case and dismissing the Bonding Company's counterclaim. The Bonding Company filed a motion entitled "Motion for Summary Judgment" which, in essence, disputed the validity of the arbitration award.

By Opinion and Order filed and entered on January 28, 1976, the District Court denied Sue Klau's Motion for Summary Judgment and ordered the Clerk of the Court to enter judgment dismissing the case and vacating the arbitration award herein. (*See* Appendix B to the Petition for a Writ of Certiorari.) On January 29, 1976, the Clerk of the Court entered judgment dismissing the case. (*See* Appendix C to the Petition for a Writ of Certiorari.)

Sue Klau appealed the District Court's Judgment to the Court of Appeals for the First Circuit. After carefully reviewing the entire record including the Architect's written decision and deposition, the First Circuit found

that Bonding Company's contentions were devoid of merit. Moreover, the Court found that Bonding Company's failure to take timely advantage of its right under the contract to obtain a "full and new arbitration" within thirty days of the Architect's final decision constituted a "separate and independent" basis for overruling the District Court's decision. On these two grounds for reversal, the First Circuit vacated the District Court's judgment and remanded the case to the lower court with direction to enter summary judgment for Sue Klau in confirmation of the arbitration award.

Argument

I. THE JUDGMENT OF THE DISTRICT COURT DISMISSING THIS ACTION BROUGHT TO CONFIRM AN ARBITRATION AWARD WITHOUT RETAINING JURISDICTION OVER THE CASE IS A FINAL JUDGMENT SUBJECT TO APPEAL BEFORE THE COURT OF APPEALS FOR THE FIRST CIRCUIT.

A. *The Court of Appeals for the First Circuit did not deviate from the accepted usual course of proceedings so as to require the exercise of this Court's power of supervision.*

A judgment or order of the district court dismissing an action brought to confirm an arbitration award is a final decision subject to review on appeal before the court of appeals. *Rogers* v. *Schering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959) *cert. denied*, 359 U.S. 991, *Thornton v. Carson*, 11 U.S. 596 (7 Cranch) (1813). The Court of Appeals for the First Circuit, in its Order entered July 8, 1977 denying Petitioner's untimely motion for rehearing where it asserted for the first time in this proceedings the alleged lack of finality of the District Court's judgment and the consequent want of appellate jurisdiction in this case, stated:

> "We note, however, that we have no doubts as to the existence of appellate jurisdiction in this case. *Compare Rogers* v. *Shering Corp.* [sic] 262 F.2d 180, 182 (3d Cir., 1959)" (Appendix "A", *infra*)

As suggested by the Court of Appeals' order of July 8, 1977, *Rogers* v. *Schering Corp., supra*, is directly applicable herein. In *Schering*, the District Court entered an order denying a motion to confirm an arbitration award and granted an opposing motion to vacate upon the finding that one of the arbitrators was disqualified to act. On appeal, the appellate jurisdiction of the Court of Appeals for the Third Circuit was called in question by the appellee alleging that the District Court order was not final. Rejecting mistaken analogies to remands for rehearing and cases requiring further judicial intervention subsequent to an order compelling arbitration, the Court held that the order refusing to confirm the arbitration award was final and appealable relying on the established doctrine that judicial orders entered as the result of arbitration proceedings are final when they are not "merely a step in the judicial enforcement of a claim nor auxiliary to a main proceeding but is the full relief sought". *Rogers* v. *Schering, supra*, 268 F.2d at 182. *See Gavlik Construction Co.* v. *H.F. Campbell Co.* v. *Wickels Corp.*, 526 F.2d 777, 782 (3d Cir. 1975); *cf. Goodall-Sanford* v. *United Textiles Workers of America*, 353 U.S. 550, 551 (1957).

In the instant case, the only relief sought by Sue Klau before the District Court was the confirmation of the arbitration award rendered herein. An action to confirm an arbitration award is not a step in the judicial enforcement of a claim nor is it auxiliary to any other judicial proceeding. Puerto Rico Arbitration Act, 32 L.P.R.A. 3221; Compare: Federal Arbitration Act, 9 U.S.C. 9; *See Rogers* v. *Schering, supra, cf. Goodall-Sanford* v. *United*

Textiles Workers of America, supra. Therefore, the judgment of the District Court herein had the requisite finality necessary for appellate jurisdiction.

B. *The Court of Appeal's action in exercising its appellate jurisdiction in this case is consonant with settled doctrine and is not in conflict with the authorities cited by the Petitioner.*

In an apparent effort to raise the specter of a conflict between the decision below and that of the Court of Appeals for the Second Circuit in *Clark* v. *Kraftco Corp.*, 447 F.2d 933 (2d Cir. 1971), Petitioner subjects the judgment of the District Court, and the Opinion and Order on which it is based, to a tortured interpretation completely at odds with the ordinary meaning of the language employed. Thus, Petitioner at page 5 of its Petition, interprets the phrase in the District Court's judgment, "this case shall be dismissed . . ." as "really mean(ing)" that the judicial proceedings "were suspended" with the result that in Petitioner's view the action was then "pending (no longer 'dismissed')" and that, furthermore, the District Court "preserve(d) jurisdiction" over the matter. Obviously, such an interpretation is contrary to the explicit language in the District Court's judgment and the Opinion and Order on which it is based and in truth is only a reflection of what the Petitioner would want the words to mean.[1]

Petitioner's reliance on *Clark* v. *Kraftco Corp., supra,* is misplaced. In *Kraftco,* the Second Circuit held that an

[1] " 'There's glory for you!' 'I don't know what you mean by "glory",' Alice said. 'I meant, "there's a nice knock-down argument for you!" ' 'But "glory" doesn't mean "a nice knock-down argument",' Alice objected. 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean,—neither more nor less.' " Carroll, Lewis (Charles Lutwidge Dodgson), *Through the Looking Glass,* Chapter 6.

order setting aside a consultant's findings and remanding the matter to him for specific findings was not an appealable order where the order was issued in the course of a continuing litigation and where the District Court expressly retained jurisdiction over the action for further determination on the merits. *Clark* v. *Kraftco Corp., supra,* 447 F.2d at 935. Because of fundamental differences between *Kraftco* and the instant case, the decision of the Second Circuit is totally inapposite. In *Kraftco,* the Court relied on the fact that the order was issued in the course of a continuing litigation where the District Court retained jurisdiction to distinguish that case from *Rogers* v. *Schering Corp., supra,* and other cases holding that judgment entered in an independent proceeding is final and appealable. *See also*: *Farr & Co.* v. *Cia. Intercontinental de Navegacion,* 243 F.2d 342, 345 (2d Cir. 1957). In the instant case, the judgment of the District Court was entered in an independent proceeding to confirm an arbitration award and not in a continuing litigation. Furthermore, the District Court in its judgment did not retain jurisdiction over the action. An order vacating an arbitration award is interlocutory only where the Court has expressly retained jurisdiction over specific questions and where the arbitration is but one step in a continuing action. *School Dist.* v. *Lundgren,* 259 F.2d, 101, 105 (9th Cir. 1958). Thus, the decision in *Kraftco* is inapplicable to this case and the judgment of the District Court is final and appealable. *Rogers* v. *Schering Corp., supra.*

Even if the District Court's invitation to the parties to rearbitrate their controversy is to be construed as an order directing arbitration, this fact alone does not destroy its finality and appealability. *Rogers* v. *Schering, supra, Goodall-Sanford* v. *United Textile Workers, supra.* As in *Schering,* the District Court's judgment in the instant case did not require or anticipate the necessity of another judicial

order to implement the arbitration award. The District Court's language stating "[o]nce the arbitration award is rendered, the parties may resort to this court for any further remedies they may deem necessary", was merely formalistic and superfluous. This is not the type of judicial intervention which would dissipate the finality of the orders as contemplated by the Third Circuit in *Schering*. *See Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons,* 62 F.2d 1004, 1005 (2d Cir. 1933). Because as in *Schering,* judicial intervention required to enforce the Court's orders to vacate and arbitrate is *de minimis,* the orders are final and appealable. *Cf. Krauss, supra,* 1005.

II. No Counterclaim Exists That Would Bar Appealability Under Rule 54(b)

A. *The District Court's disposition of the case dismissed the entire action and was therefore final.*

An order dismissing the entire action is clearly final and appealable. 9 *Moore's Federal Practice* Paragraph 110.13 (1), at 152 (2d Ed. 1975). The Ninth Circuit has drawn a clear line between orders which dismiss the case and those which dismiss a complaint. *Firchau* v. *Diamond National Corporation,* 345 F.2d 269, 270-71 (9th Cir. 1965). Those orders dismissing but one of several complaints in a multi-claims action are clearly interlocutory and nonappealable absent a Rule 54(b) certificate.

The language of District Court's judgment leaves no doubt that the entire action was dismissed. Although the word "case" rather than "action" was used, the two words are synonymous. *See Black's Law Dictionary,* 271 (4th Ed. 1951). Moreover, both parties had motioned for summary judgment on the entire case and the District Court denied both motions. In denying these motions and

thereafter ruling "This case shall be dismissed", the District Court gave no indication that Petitioner's counterclaim was not embraced by the dismissal.

B. *Even if the District Court's Judgment had not Embraced Petitioner's illusory counterclaim, the counterclaim was rendered res judicata by the Architect's award, and it is nonsensical to deny an appeal on the basis of a court's failure to consider a res judicata claim.*

1. *The Counterclaim was res judicata.*

Courts have held that an arbitration award precludes an action on any matter submitted or which could have been submitted to the arbitrator for decision. *Behrens* v. *Skelly,* 173 F.2d 715 (3rd Cir. 1949), *cert. denied,* 338 U.S. 821; *Goldstein* v. *Doft,* 236 F. Supp. 730 (S.D.N.Y. 1964), *aff'd* 353 F.2d 484, *cert. denied,* 383 U.S. 960; *Ritchie* v. *Landau,* 475 F.2d 151 (2d Cir. 1973). In *Goldstein* v. *Doft,* the Plaintiff's claim for commissions allegedly owed on sales in his territories was denied by arbitrators. Subsequently, Plaintiff instituted an action against Defendants for inducement of a breach of contract, and misrepresentation on the part of Defendant, which, in effect, deprived him of the commissions he had sought in the prior arbitration. The court entered judgment against Plaintiff holding that the prior arbitration award barred his claim as *res judicata* and went on to explain its reasoning as follows:

> Before Plaintiff can succeed on either of the latter claims (inducement of a breach of contract and unjust enrichment), he would have to establish as an essential element a breach of the agreement under which he was to receive his commissions. Since the award went against him on that issue, he may not now relitigate it.

> Since those claims are directly related to the contract and within its broad arbitration provision, they might have been brought before the arbitrators, and also are barred 236 F. Supp. at 732, 733 (citations omitted).

The Court went on to hold that a shift in the legal theories under which Plaintiff sought relief did not alter its conclusion. *See also Goldstein* v. *Doft,* 353 F.2d 484 (2d Cir. 1965); *Behrens* v *Skelly, supra,* at 719.[2]

The doctrine of *res judicata* as stated above is directly applicable herein. There is no question that the parties here are identical to the parties before the Architect. Furthermore, the Bonding Company's purported counterclaim was directly adjudicated by the Architect's decision since the Architect made an express determination regarding the percentage of the work realized which was contemplated in the original construction agreement. Furthermore, assuming for the purpose of argumentation that the Bonding Company's claim was not presented to the Architect, it is barred by the doctrine of *res judicata* since the claims might have been brought before the Architect. *Goldstein* v. *Doft, supra.* It is also obvious that the Architect's award necessarily concludes that the Bonds issued by Defendant were valid and Plaintiff was owed by Defendant pursuant to the Bonds the amount stated in the Architect's letters.

The Bonding Company's counterclaim was fully adjudicated and decided by the Architect's decision and further-

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[2] The doctrine of *res judicata* set forth at Article 1204 of the Civil Code of Puerto Rico, 31 L.P.R.A. 3343 has been interpreted by the Courts of Puerto Rico to bar subsequent actions between the same parties for the same cause of action and things, not only regarding questions actually litigated and adjudicated, but also questions that could have been properly litigated and adjudicated in the former action. *Capo Sanchez* v. *Secretary of the Treasury,* 92 P.R.R. 817, 819 (1965) *In re de Manati,* 357 F. Supp. 1253 (D.P.R., 1972).

more, the Bonding Company had full opportunity to litigate its claim before the Architect. In this regard, the words of the Court in *Ritchie* v. *Landau* are particularly appropriate:

> "The critical fact in both cases is that the Plaintiffs (here the Bonding Company) were given one opportunity to litigate their claims for compensation before the arbitrators; and one opportunity is all they are entitled to have." 475 F.2d at 156.

2. *Denial of the Appeal would have made little sense in terms of judicial economy and fairness.*

A determination by the Court of Appeals to deny appealability because the District Court had not expressly considered a *res judicata* counterclaim would have been nonsensical and anathemas to principles of judicial economy. In making such a determination, the Court would have held form above substance at the price of duplicative and more costly litigation borne by both parties.

Parties seek arbitration for the purpose of avoiding the delay and costly expense of courtroom litigation. Therefore, any order that denies appealability of court decisions confirming or vacating an arbitration award is antithetical to that purpose. An erroneous determination by a District Court setting aside an award could portend substantial and additional delay and expense for parties ordered back into arbitration. Given the purpose underlying arbitration, additional delays and costs make little sense when they could possibly be avoided by immediate appeal. *See Stathatos* v. *Arnold Bernstein S.S. Corp.,* 202 F.2d 525, 529 (2d Cir. 1953) (Frank, J., dissenting).

Because the Bonding Company's counterclaim was *res judicata,* the Bonding Company's stand was not harmed

by the District Court's failure to rule expressly on its propriety. On the other hand, if the Court of Appeals had considered the District Court's alleged neglect to issue an express order on the counterclaim fatal to Sue Klau's appeal, it would have forced both parties to incur additional expense and to invest time in new arbitration proceedings. Such proceedings would have been subject to additional confirmation hearings as well as appellate review. To have subjected both the parties and the judicial system to undergo such additional strain and cost because a District Court may have failed to rule expressly on a counterclaim which was *res judicata* have defied notions of fairness and judicial economy.

III. Even Assuming Arguendo That the District Court's Dismissal of the Case Was Interlocutory and That the District Court Had Not Rendered Judgment on the Counterclaim, the Dismissal Would Still Be Appealable Under the *Gillespie* Doctrine.

In *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964), the Court recognized that the question of finality under 28 U.S.C. Sec. 1291 is "frequently so close . . . that it is impossible to derive a formula to resolve all marginal cases coming within what might be called the 'twilight zone' of finality". 279 U.S. at 152. The Court noted that a decision need not be the last possible order in a case to be final, and that courts should give a "practical rather than a technical construction" to those marginal orders falling within the "twilight zone". In practically construing such orders, indicated the Court, courts must balance "the inconvenience and costs of piecemeal review on one hand and the danger of denying justice by delay on the other". 379 U.S. at 153.

Court of Appeals have used the "practical approach" suggested in *Gillespie* as a rationale to permit appeal of orders which might otherwise have been considered interlocutory. *See, e.g., Plymouth Mut. Life Ins. Co.* v. *Illinois Mid-Continent Life Ins. Co. of Chicago,* 378 F.2d 389 (3d Cir. 1967) (orders to select an impartial insurance adjuster and appointing said adjuster); *Fox* v. *City of West Palm Beach,* 383 F.2d 189 (5th Cir. 1967) (order denying mandatory injunction and relegating plaintiff to ordinary action for damages); *Staggers* v. *Otto Gerdau Co.,* 359 F.2d 292 (2d Cir. 1966) (orders to substitute parties pursuant to Fed. R. Civ. P. 25(a) and to amend complaint by adding new parties). The power of courts of appeal to deviate occasionally from technical definitions of finality is necessary for sensible and economical judicial administration. 9 *Moore's Federal Practice,* ¶110.12 at 151 (2d Ed. 1975); *cf. Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). The *Gillespie* Doctrine exists to assure that courts of appeals will be able to rule on orders which would have been appealable under 28 U.S.C. Sec. 1292(b) and which have been appealed in good faith. By invoking the doctrine, a court of appeals can avoid needless waste of time and money in judicial administration and repetitious litigation incurred when questionable orders are remanded without the opportunity for a more efficient appeal. *See Staggers* v. *Otto Gerday Co., Inc.,* 359 F.2d 292, 295 (2d Cir. 1966).

If the orders in the instant case are not final they clearly fall in the "twilight zone" of orders which are not easily defined as either final or interlocutory. The Judgment of the District Court in the instant case clearly falls within such a "zone". Said Judgment vacates the arbitration award rendered in this case. Furthermore, notwithstanding Petitioner's protestations to the contrary, the Judgment states that the action is "dismissed" and neither the Judg-

ment nor the Opinion and Order contained a reservation of jurisdiction by the District Court. In such circumstances, Petitioner would require Sue Klau to indulge in the type of interpretation of the District Court's Judgment which Petitioner exercises in its Petition and assume the risk of waiving its right to a judicial review of the District Court's judgment in a subsequent appeal had the parties undertaken new arbitration of their controversy. It requires little imagination to assume that the Petitioner herein in an appeal taken after subsequent arbitration would argue vehemently that the District Court's Judgment reviewed by the Court of Appeals in the instant case was final and not subject to review because Sue Klau had failed to take a timely appeal.

Considerations of judicial economy and fairness are relevant under the *Gillespie* doctrine to determine whether an appeal may lie from orders falling within the "twilight zone". In this case, such considerations far outweigh the possible damages wrought by piecemeal review. As found by the Court of Appeals in its opinion, the arbitration award rendered by the Architect in this case was rendered pursuant to the contract provisions agreed to by the parties (Appendix "A" to Petition for Writ of Certiorari, at A-8 – A-10). The Court of Appeal's opinion reveals that careful consideration was given to the arguments advanced by the Petitioner below in seeking to invalidate the arbitration award and these were found frivolous. Furthermore, the contract documents provided, and the Court of Appeals so found, that Petitioner was entitled to obtain a new and full arbitration of the controversy by filing a timely notice within thirty days of the Architect's award. All of Petitioner's contentions on the merits could be argued and decided anew in an arbitration conducted pursuant to the Rules of the American Arbitration Association had it so desired. However, after having been afforded a full and

complete opportunity to present all its arguments before the Architect and even in view of the fact that under the agreement between the parties Petitioner was entitled to a complete rearbitration of its claims, it chose to do nothing and thus waived its right to further arbitration. Petitioner now wants this Court to relieve it from the consequences of its failure to act in order to submit itself to a proceeding it disavowed below. Having had a full and complete opportunity before the Architect to present its arguments and contentions, Petitioner wishes a second opportunity to repeat the same exercise and thus further delay payment of Sue Klau's just claims which were set forth in detail and have been pending since its demand letter of July 25, 1973. A resubmission of this matter to arbitration would frustrate the very policies implicit in arbitration proceedings. These are the considerations which prompted this Court to fashion the *Gillespie* doctrine.

Conclusion

Because Petitioner has failed to establish any grounds for the granting of a Writ of Certiorari under Rule 19 of the Rules of this Court, the Court should deny issuance of the Writ.

Respectfully submitted,

EDWARD M. BORGES
O'NEILL & BORGES
Chase Manhattan Bank Building
Tenth Floor
Hato Rey, Puerto Rico 00918
Attorneys for Respondent

APPENDIX "A"

United States Court of Appeals
For the First Circuit

No. 76-1143.

SUE KLAU ENTERPRISES, INC.,
PLAINTIFF, APPELLANT,
v.
AMERICAN FIDELITY INSURANCE COMPANY,
DEFENDANT, APPELLEE.

ORDER OF COURT
ENTERED JULY 8, 1977

The motion for permission to file a petition for rehearing out of time is denied. The judgment of our court was entered April 6, 1977, not June 6, 1977. Petitioner has utterly failed to make the kind of showing of justifiable delay that would lead me to permit a petition to be filed more than two months after the entry of judgment. We note however that we have no doubts as to the existence of appellate jurisdiction in this case. *Compare Rogers* v. *Shering Corp.*, 262 F.2d 180, 182 (3d Cir. 1959).

By the Court:
DANA H. GALLUP, *Clerk.*
By (s) FRANCIS P. SCIGLIANO
Chief Deputy Clerk.

[cc: Messrs. Tulla and Gonzalez-Mangual.]